

Estate of AUBREY P. BROOKS)	BRB No. 92-0555
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADDSCO INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES, DEPARTMENT OF)	
LABOR)	
Respondent)	
)	
Estate of OSSIE JONES, SR.)	BRB No. 92-0574
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADDSCO INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS,)	
UNITED STATES, DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals of the Decisions and Orders - Awarding Benefits of A. A. Simpson, Jr.,
Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, & Fleming, P.C.), Mobile, Alabama, for
claimants.

Walter R. Meigs, Mobile, Alabama, for the self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decisions and Orders - Awarding Benefits (89-LHC-3293 and 89-LHC-3295) of Administrative Law Judge A. A. Simpson, Jr., rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case involves consolidated appeals by the estates of two deceased employees of awards of occupational hearing loss benefits made by the administrative law judge to the Special Fund pursuant to 33 U.S.C. §908(d)(3) after the decedents' deaths. Decedent Jones worked at employer's facility from 1942 until he voluntarily retired on February 24, 1978. On March 28, 1978, he underwent an audiological evaluation at the University of South Alabama Speech and Hearing Center which indicated that he suffered from a 26 percent binaural impairment. On April 23, 1978, he filed a claim for noise-induced work-related hearing loss under the Act based on the March 29, 1978, audiogram. Decedent Jones died of lung cancer on March 19, 1989, prior to the adjudication of his claim, leaving no statutory survivors under Section 8(d)(1), 33 U.S.C. §908(d)(1). This case was referred to the Office of Administrative Law Judges on August 3, 1989. The estate of the deceased employee was substituted as the claimant.

Decedent Brooks worked at employer's facility from 1956 until he voluntarily retired on June 6, 1983. On April 3, 1987, he sought benefits under the Act for a 5.9 percent noise-induced work-related binaural hearing loss based on an audiometric examination administered on November 3, 1986, at the University of South Alabama Speech and Hearing Center. Decedent Brooks died on April 17, 1989, prior to the adjudication of his claim, leaving no survivors under Section 8(d)(1). This case was referred to the Office of Administrative Law Judges on August 3, 1989. The estate of

¹By Order dated August 18, 1992, the Board granted claimants' motion to consolidate the appeals in *Brooks v. ADDSCO Industries, Inc.*, BRB No. 92-0555 and *Jones v. ADDSCO Industries, Inc.*, BRB No. 92-0574, for purposes of decision. 20 C.F.R. §802.104(a).

the deceased employee was substituted as the claimant.

No hearings were held in the consolidated cases, as the parties were in agreement as to all material facts. Claimants and employer entered into stipulations regarding causation as well as the date of injury and the extent of the binaural hearing loss revealed on the filing audiograms. According to the administrative law judge's decisions, the parties also stipulated to the applicable National Average Weekly Wage as of the date of the filing audiogram in each case. Accordingly, the only issues remaining for adjudication before the administrative law judge were whether the decedents' occupational hearing loss benefits should be calculated under Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988) or Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988), and whether the unpaid benefits which had accrued from the date of the filing audiogram to the date of the decedents' deaths were the property of the decedents' estates under Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3)(1988).

The administrative law judge found that as each decedent was a retiree, employer was liable for permanent partial disability compensation under Section 8(c)(23). Inasmuch as both decedents had died without any statutory survivors, the administrative law judge further determined that benefits which accrued from the date of the filing audiogram to the date of death were to be paid by employer to the Special Fund pursuant to Section 8(d)(3) of the Act. Lastly, in both cases, the administrative law judge found that as there had been no successful prosecution on behalf of the claimant, counsel was not entitled to an attorney's fee under Section 28 of the Act, 33 U.S.C. §928.

Claimants appeal, challenging the administrative law judge's award of benefits to the Special Fund. Specifically, the claimants contend that each decedent's estate is entitled to the benefits which accrued to the decedent prior to his death and that such benefits are properly calculable under Section 8(c)(13) of the Act. Employer responds, urging that the Board affirm the awards of benefits to the Special Fund. Employer, however, concedes that since the administrative law judge issued the decisions in the consolidated cases, the United States Supreme Court held in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), that all occupational hearing loss is properly compensated under Section 8(c)(13). Employer asserts that if the Board concludes that *Bath Iron Works* is to be retroactively applied, as employer believes it should be, the case must be remanded for the administrative law judge to ascertain the appropriate average weekly wage consistent with *Bath Iron Works*. The Director, Office of Workers' Compensation Programs (the Director), also responds, arguing that the administrative law judge properly found that the Special Fund is entitled to the deceased employees' accrued compensation. The Director maintains, however, that the administrative law judge erred in denying claimants' counsel an attorney's fee, as employer controverted the claims and claimants ultimately prevailed in establishing employer's liability for the decedents' hearing losses even if, due to operation of Section 8(d)(3), such benefits are to be paid to the Special Fund.

Initially, we agree that in light of *Bath Iron Works*, which was issued by the Supreme Court after the administrative law judge's decisions in the consolidated cases, compensation for the

decedents' hearing loss benefits must be calculated pursuant to Section 8(c)(13) of the Act. In *Bath Iron Works*, the United States Supreme Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), rather than Section 8(c)(23), of the Act. We therefore vacate the administrative law judge's award of benefits in the consolidated cases under Section 8(c)(23), and modify the administrative law judge's decisions to award benefits under Section 8(c)(13) consistent with the parties' stipulations. Employer is thus liable for 11.8 weeks of permanent partial disability compensation for the 5.9 percent binaural loss sustained by decedent Brooks and for 52 weeks of compensation for the 26 percent binaural loss sustained by decedent Jones. 33 U.S.C. §908(c)(13)(B).

In *Bath Iron Works*, the Court also held that the date of the last exposure to injurious noise is the relevant date of injury for purposes of calculating the applicable average weekly wage rather than the date of awareness under Section 10(i) of the Act, 33 U.S.C. §910(i). In its response brief, employer argues that if the Board retroactively applies *Bath Iron Works*, the case should be remanded to the administrative law judge so he can recalculate the applicable average weekly wage consistent with *Bath Iron Works*. Claimants oppose this argument, asserting that employer is attempting to back out of the stipulations the parties agreed to in the presentation of their claims. As the stipulations entered into by the parties regarding the applicable average weekly wage were based on the now incorrect application of law, we reject the claimants' contention that employer should be bound to its stipulations. See *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Accordingly, we vacate the administrative law judge's average weekly wage findings in the consolidated cases and remand to allow him to determine the applicable average weekly wage as of each decedent's last injurious exposure consistent with *Bath Iron Works*.

Claimants further challenge the administrative law judge's decision to award benefits accruing prior to the decedent's death to the Special Fund. Section 8(d) of the Act provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has recently interpreted Section 8(d) and held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered. *Clemon v. ADDSCO Industries*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994). See generally *Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT)(11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). In accordance with this holding, the Board additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS 36-38.

In the cases currently before us, as decedent Jones retired in 1978, the entire 52 weeks of benefits due for his hearing loss claim accrued prior to his death on March 19, 1989. As decedent Brooks retired in 1983, the 11.8 weeks of benefits due for his hearing loss claim also accrued prior to his death on April 17, 1989. 33 U.S.C. §908(c)(13)(1988); *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154(CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76, 79 (1993). As both decedents had a vested right in the permanent partial disability benefits which accrued during their lifetimes, their estates are entitled to these permanent partial disability benefits. Accordingly, we reverse the administrative law judge's award of the accrued benefits to the Special Fund for the reasons set forth in *Clemon* and *Wood*, and modify the administrative law judge's awards in the consolidated cases to reflect that each decedent's estate is entitled to the accrued but unpaid scheduled permanent partial disability benefits owed to the decedent. *Clemon*, 28 BRBS at 111; *Wood*, 28 BRBS at 35. See also *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125, 129 (1994)(Decision and Order on Remand).

In their Supplemental Petition For Review, the claimants also contend that the administrative law judge erred in denying counsel an attorney's fee because the Act "authorizes payment of attorney['s] fees when payment is obtained." The administrative law judge denied claimants' counsel an attorney's fee payable by employer because he concluded that counsel's efforts did not result in the successful prosecution of the claim on behalf of the claimant as is required under Section 28 of the Act, 33 U.S.C. §928.

The administrative law judge's denial of a fee is reversed. Under Section 28(a) of the Act, 33 U.S.C. §928(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. Inasmuch as employer disputed liability for decedents' occupational hearing loss benefits and their estates succeeded in establishing entitlement to these benefits, claimants have prevailed in obtaining compensation which employer declined to pay. Claimants' counsel is thus entitled to an attorney's fee payable by employer pursuant to Section 28(a). On remand, the administrative law judge must enter an appropriate fee. See *Hamilton*, 28 BRBS at 128.

Accordingly, the administrative law judge's Decision and Orders - Awarding Benefits are reversed insofar as they award benefits to the Special Fund, and the awards in the consolidated cases are modified to reflect employer's liability pursuant to Section 8(c)(13), payable to decedents' estates. The cases are remanded for a determination of the applicable average weekly wage consistent with *Bath Iron Works*. Further, the administrative law judge's denial of an attorney's fee in both cases is reversed, and the cases are remanded for consideration of counsel's fee petition and any objections made thereto. In all other respects, the administrative law judge's Decisions and Orders are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge